IN THE SUPREME COURT OF FLORIDA

NO.SC04-201

MICHAEL DUANE ZACK,

Petitioner,

v.

JAMES V. CROSBY, JR.,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Zack's first habeas corpus petition in this Court. Art. 1, Sec 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating ineffective assistance of appellate counsel, that Mr. Zack was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentence violated constitutional imperatives.

Citations shall be as follows: The record on appeal from Mr. Zack's 1997 trial shall be referred to as "(R. ___)" followed by the appropriate page number and the trial transcripts shall be referred to as "(T. ___)" followed by the appropriate page number.

INTRODUCTION

Significant errors which occurred during Mr. Zack's trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Zack involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Zack. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "**confidence** in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Petitioner respectfully requests oral argument.

PROCEDURAL HISTORY

The Circuit Court of the First Judicial Circuit, Escambia County, entered the judgment and sentence under consideration.

Mr. Zack was charged by indictment dated June 25, 1996, with one count of first degree murder, one count of robbery and one count of sexual battery (R. 1-3).

Mr. Zack's trial began in September, 1997. The jury returned a verdict of guilty on September 15, 1997 (R. 419-20).

In October, 1997, the penalty proceedings occurred. The jury recommended a death sentence by a vote of eleven to one (R. 792). On November 24, 1997, the trial court imposed a death sentence and entered his sentencing order (R. 859-75).

This Court affirmed Mr. Zack's conviction and sentence on direct appeal. Zack v. State, 753 So. 2d 9 (Fla. 2000). The United State Supreme Court denied certiorari. Zack v. Florida, 531 U.S. 858 (2000).

Mr. Zack now files this petition for writ of habeas corpus raising issues of ineffective assistance of appellate counsel and fundamental error.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Zack's direct appeal. See Wilson, 474 So. 2d at 1163.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Zack asserts that his conviction and sentence of death were obtained and affirmed during this Court's appellate review process in violation of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights to the United States Constitution and corresponding provisions of the Florida Constitution.

CLAIM I

THE STATE PEREMPTORILY CHALLENGED AND REMOVED TWO FEMALE, AFRICAN-AMERICAN JURORS BASED ON THEIR GENDER AND RACE OVER DEFENSE COUNSEL'S OBJECTION AND IN VIOLATION OF MR ZACK'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ISSUE DURING MR. ZACK'S DIRECT APPEAL.

The use of peremptory challenges to eliminate jurors based on race and gender violates the constitutional guarantees of trial by a fair and impartial jury, equal protection and due process. Art I, §§ 2, 9, 16, Fla. Const.; U.S. Const. Am. 8, 14; see Melbourne v. State, 679 So. 2d 759 (Fla. 1996); Batson v. Kentucky, 476 U.S. 79 (1986). In State v. Neil, 457 So. 2d 481 (Fla. 1984), this Court held that where a party's reasons for exercising a strike are put in issue, article I, section 16 of the Florida Constitution requires a court to examine the party's reasons for exercising

the strike. The United States Supreme Court reached the same conclusion two years later in Batson. The Batson court required a "neutral explanation" for the questionable peremptory strikes. 476 U.S. 97.

In Curtis v. State, 685 So. 2d 1234, 1236-7 (Fla. 1996), which was decided the year before Mr. Zack's trial, this Court explained the law:

> This Court recently updated Florida law governing racially motivated peremptory challenges in Melbourne v. State, 679 So. 2d 759 (Fla. 1996), setting forth the following guidelines:
>
> > A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) that the venire person is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.
> >
> > At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all of the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness. Throughout the process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.
>
> Id. at 764 (footnotes omitted).
>
> We noted that reviewing courts should enforce the above guidelines in a non-rigid manner, giving

due weight to the trial court's ruling:

> Voir dire proceedings are extraordinarily rich in diversity and no rigid set of rules will work in every case. Accordingly, reviewing courts should keep in mind [the following principle] when enforcing the above guidelines[:]. . . [T]he trial court's decision turns on an assessment of credibility and will be affirmed on appeal unless clearly erroneous.

Id. at 764-5 (footnotes omitted).

In Mr. Zack's case, steps 1 and 2 were met by defense counsel; defense counsel objected to the State's peremptory challenges and identified the jurors as being African-American females (T. 136, 140). The issue in Mr. Zack's case focuses on step 3: the genuineness of the State's asserted race neutral reason for excluding two African-American, female jurors: Shelia Gillam and Rita Jones.[1]

The State explained his reasons for peremptorily challenging Jurors Gillam and Jones:

> That's my first strike. There's been no pattern of any sort that's been exhibited, but the reason for the strike is that she's employed at the Lakeview Center. On the juror questionnaire, [Gillam's] employed at the Lakeview Center. Because there's going to be a great deal of psychological evidence coming in during the penalty phase and perhaps on guilt-innocence, I'm not comfortable with it.

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[1]The prosecutor challenged the only other African-American female in the venire for cause because she did not believe she could be fair due to the fact that her sister had been murdered (T. 137-9).

(T. 136-7). As to Juror Jones, the State explained:

> The reason for challenging Ms. Jones, who for the record is a black female, is that she also is employed at the Lakeview Center. She has had some knowledge concerning posttraumatic stress syndrome. For the purpose of the record, so the record is clear, the Lakeview Center here in Pensacola is a center that administers psychological support, therapy, counseling, over a wide array of – they made a – meet a wide array of psychological needs within the community, not the least of which is either heavily abused use by the criminal justice system –

(T. 139-40). The State also misinformed the court as to the law when immediately after explaining his reason for challenging Juror Jones, the State told the court: "Under the current case law, Your Honor, all I have to do is state a reason that is objectively reasonable. . . . If it is objectively reasonable, then the strike should be sustained." (T. 140).

The court was concerned about the State's peremptory challenges: "You know, I'm a little concerned about [your peremptory challenges], the mere fact that she's got some employment whereby she's going to have some special knowledge that the other jurors don't have." (T. 141). Despite the court's concern, he allowed the State to peremptorily challenge both Juror Gillam and Juror Jones.

The State's explanation was neither "genuine" nor supported by the record. "When the appellate court can

discern that the actual responses differ from what was represented to and accepted by the trial court, the court's ruling is reversed." Dorsey v. State, 2003 Fla. LEXIS 2153, *6 (December 18, 2003); See e.g., McCarter v. State, 791 So. 2d 557, 558 (Fla. 2d DCA 2001)(holding that trial court erred in finding reason to be valid where it was refuted by transcript of voir dire); Michelin v. North America, Inc. V. Lovett, 731 So. 2d 736, 742 (Fla. 4th DCA) 1999(holding that he denial of peremptory challenge constituted clear error where the record refuted the implied finding that the reason given for the strike was not genuine); Overstreet v. State, 712 So. 2d 1174, 1177 (Fla. 3d DCA 1998)(relying on review of transcript in concluding that the trial court erred in sustaining a peremptory challenge because of "faulty recollection of the responses given during voir dire.").

In Mr. Zack's case, during voir dire, the first witness that the State specifically questioned was juror Gillam (T. 52-54).[2] Juror Gillam stated that she could be fair and impartial despite having been exposed to some publicity about the case (T. 53). The State never inquired further about Juror Gillam's employment at the Lakeview Center. Thus,

[2]The specific line of questioning followed some general questions to the entire venire about knowledge of witnesses.

despite the explanation for the challenge, the State did not know what position Juror Gillam held at the Lakeview Center, whether she worked as an administrator, as a counselor, a nurse, or even as a janitor. Thus, there was no basis, as the State later suggested, that Ms. Gillam had any knowledge or background with post-traumatic stress disorder (PTSD). To the contrary, when defense counsel specifically questioned the venire about their knowledge of PTSD, Juror Gillam did not respond that she had any particular or specialized knowledge of the condition (see T. 132-5).[3]

While Juror Jones responded that she had some information about PTSD, she was not asked any further questions to determine whether or not she could be fair and impartial (T. 133).[4]

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[3]Despite the State's assertion that the familiarity with the suggested mental problems Mr. Zack suffered was the basis of the peremptory strikes, the State did not ask the venire any questions about this topic. Defense counsel made the only inquiry into this area.

[4]There were two jurors with the surname Jones in the venire. The record is not clear whether or not Rita Jones, the African-American female, was the juror who was a medic during the Viet Nam War and was currently employed as a nurse. For the sake of argument, Mr. Zack directs his argument to the most beneficial position of the State which would be that the Juror Jones, who was employed as a nurse, was the juror the State peremptorily challenged, Rita Jones. If the nurse was not Rita Jones, then again, the juror never responded affirmatively to the State's questions about having any particular knowledge of mental health issues.

Defense counsel also inquired about the venire's experience with fetal alcohol syndrome (T. 134). Juror Jones responded that due to her employment as a nurse, she was familiar with fetal alcohol syndrome from what she had learned in class (T. 134).[5] The State did not follow-up and question Juror Jones any further about whether or not her limited familiarity with fetal alcohol syndrome would effect her decision making. Again, Juror Gillam did not respond that she had any familiarity with fetal alcohol syndrome.

While neither Juror Gillam not Juror Jones provided any reason for the State to be "uncomfortable" with them as jurors, perhaps most illustrative of the State's lack of genuineness is found in the fact that Jurors Gillam and Jones were the only jurors that the State peremptorily challenged at all.[6] In fact, the State accepted non-African-American females as jurors, who actually did have exposure and familiarity with PTSD.

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[5]The record is also unclear as to whether the juror who responded to the question about fetal alcohol syndrome was Rita Jones or the other female juror with the surname Jones.

[6]The sequence of the State's challenges was to peremptorily challenge Juror Gillam, an African-American female; to challenge for cause Juror Worthey, an African-American female; and to challenge peremptorily Juror Jones, an African-American female. The State challenged no other jurors for cause or peremptorily. No other Africa-American females were included in the venire.

Juror Hellner stated that she was currently a psychology student at West Florida (T. 132). Likewise, Juror Mraz served in the Vietnam War and was familiar with PTSD. The State did not challenge either of these individuals who ultimately were selected as jurors. Thus, the State's explanation as to the challenges of Juror Gillam and Jones was not genuine or even reasonable. The court erred in allowing the State to peremptorily challenge both of the remaining African-American females. The State's peremptory challenges, based on race and gender, violated Mr. Zack's constitutional right to a fair and impartial jury.

Trial counsel properly preserved this claim of error. Appellate counsel was ineffective for failing to raise this issue. Habeas relief is proper.

CLAIM II

MR. ZACK WAS DENIED A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PROSECUTOR'S ARGUMENTS PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE.

The prosecutor's conduct was contrary to the law and prejudiced the jury's consideration of the evidence in violation of the Constitution. This Court has held that when improper conduct by the prosecutor "permeates" a case, relief

is proper. Garcia v. State, So. 2d 1325 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

During its guilt phase closing argument, defense counsel objected to and requested a mistrial due to the State's referring to Mr. Zack as a liar:

> Now, part of your common sense is, is that lies always have some element of truth. They are almost always based on some truthful foundation. They originate from the truth, but they are distorted to fit or reflect well on the liar that is telling the story.

(T. 1373). The court suggested that the State refrain from using the characterization because it was the court's belief that it was a form of misconduct (T. 1374). Indeed, courts have found that "[i]t is 'unquestionably improper' for a prosecutor to state that a defendant has lied." Connelly v. State, 744 So. 2d 531, 533 (Fla. 2d DCA 1999), quoting Washington v. State, 687 So. 2d 279, 280 (Fla. 2d DCA 1997). Error occurs, as did in Mr. Zack's case when the State indulges in personal attacks upon a defendant. Jackson v. State, 421 So. 2d 15 (Fla. 3d DCA 1982).

Furthermore, defense counsel objected when the State argued: "Go back there and look at this evidence. You work together, as I know every one of you will, and you come out here on behalf of the people of this community and the defendant and let your verdict speak the truth, guilty of

first degree murder, guilty of sexual battery, guilty of robbery." (T. 1449-50). The State's comment that the jurors were acting on behalf of the community was improper.

The State engaged in similarly egregious behavior during its penalty phase closing argument. The State improperly urged the jury not to consider sympathy towards Mr. Zack when he told them: "I don't want sympathy in that jury room on my evidence, and don't let it in the jury room on what the Defense presented to you." (T. 2077). The State made such an argument knowing that the defense had specifically requested that the court instruct the jury that sympathy could be considered in reviewing the mitigating evidence and background of Mr. Zack (T. 1580).

Prosecutors have a special duty of integrity in their arguments. The comments made here violate that duty of integrity to the jury. Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985). Under the sentencing scheme in Florida the jury has complete discretion in choosing between life imprisonment or a death recommendation. "Mercy may be a part of that discretion." Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(en banc). The argument in Mr. Zack's case is precisely the type of argument that violates due process and the Eighth Amendment. See Drake,

762 F.2d 1449 at 1458-61.

Also, in the penalty phase, the State violated the Golden Rule when asking the jurors to imagine what the victim went through in her final moments:

> Can any one of us imagine, except to look at the evidence, the terror that was coursing through the victim during her last few minutes of life? Beaten down in her own home by a person that she extended trust to, clothes ripped off of her, thrown bleeding into her bed, raped in her bed, chased into another part of the house, caught, thrown to the floor, head slammed to the floor. Look at this, ladies and gentleman, and ask yourselves whether or not this is torture in the classic sense.

(T. 2070). "Such violations of the 'Golden Rule' against placing the jury in the position of the victim, and having them imagine their pain are clearly prohibited." Urbin v. State, 714 So. 2d 411, 419 (Fla. 1998)(citation omitted); See Gomez v. State, 751 So. 2d 630 (3rd DCA 1999)("Prosecutor 'golden rule' arguments during closing argument of attempted murder trial, suggesting that jurors would have acted differently if they had placed themselves in defendant's shoes and if case really involved self-defense, and unfounded questions during cross-examination concerning gang membership and familiarity with guns were improper and unprofessional"); See also Bullard v. State, 436 So. 2d 962 (3rd DCA 1983).

The cumulative effect of the prosecutor's comments was to "improperly appeal to the jury's passions and prejudices."

Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). "Although this legal precept -- and indeed the rule of objective, dispassionate law in general -- may sometimes be hard to abide, the alternative, -- a court ruled by emotion -- is far worse." Jones v. State, 705 So. 2d 1364, 1367 (Fla. 1998). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999)("The role of counsel in closing argument is to assist the jury in analyzing the evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence.")

Appellate counsel was ineffective for failing to raise this issue, even in the absence of an objection by defense counsel. Egregious prosecutorial misconduct, like that which occurred here, constitutes fundamental error. Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988)("Our cases have also recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below or even in the presence of a rebuke by the trial judge."); see also

Urbin v. State, 714 So. 2d 411, 418, fn8 (Fla. 1998).

Appellate counsel's failure to raise this issue constitutes deficient performance which prejudiced Mr. Zack. Habeas relief is warranted.

CLAIM III

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. ZACK'S TRIAL THAT IT RESULTED IN THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

During the penalty phase of Mr. Zack's trial, the State introduced evidence that was not relevant to any statutory aggravating factor and argued this evidence and other impermissible matters as a basis for imposing death. Further, the trial court relied upon several impermissible factors in sentencing Mr. Zack to death.

At penalty phase, the State presented the testimony of Dr. Harry McClaren, a psychologist. In the course of his testimony, Dr. McClaren told the jury that he had received information that Mr. Zack was hostile toward women:

> Q: And did you see anything in your testing which indicated a violent, explosive temper, poor impulse control?
>
> A: No. As I said, the testing was more consistent with somebody who was under a tremendous amount of pressure, understandably given his legal situation.

Q: And was there indications during the course of the investigation that you conducted prior to testifying here today that indicated that there was some anger directed toward women?

MR. KILLAM: Your Honor, I'd like to approach the bench again.

(At the bench:

MR. KILLAM: I think we're running into a confrontation problem here because this questioning encompasses people who have not testified before this Court, one being a Candice Fletcher.

MR. MURRAY: She's going to testify.

MR. KILLAM: I don't see the relevance of her testimony in rebuttal.

MR. MURRAY: Well, I guess you'll have to wait until you hear it, won't you?

MR. KILLAM: I think it needs to be proffered before it comes in.

THE COURT: I'm not going to proffer it. If he says –

MR. KILLAM: It's not an aggravator.

THE COURT: If he says he's got some logical basis to present the testimony of that witness in rebuttal to the testimony you gave in support of mitigating factors, I'm going to allow it, but, you know, if during the course of the testimony you find some valid objection, you make it and I'll rule on it.

MR. KILLAM: Judge, he's limited to rebutting mitigation evidence and the fact that this man is impulsive as a result of fetal alcohol is already raised and he's getting into something else. And that's not an aggravator.

THE COURT: Okay. Tell me specifically what your

objection is now to this witness.

MR. KILLAM: His testimony is beyond the scope of mitigating rebuttal.

MR. MURRAY: That's not true. We're talking about his experts testified to posttraumatic stress disorder, fetal alcohol syndrome, all the underlying pathology, and I crossed extensively about current history. I'm going to bring the current history in.

THE COURT: Objection overruled.

(Bench conference concluded.)

Q: (By Mr. Murray) Do you recall my last question?

A: Yes.

Q: Are you able to answer that question?

A: **One person that I interviewed apart from the events that were described in statements given to law enforcement did suggest violence toward women**.

Q: Let's take those one at a time. The statements that he made to law enforcement, what did he make in reference to?

A: Something to the effect that a woman had taken his mother from him and that a woman had taken his child from him. I mean, that was in the statements. **Of course, the offenses for which he was convicted, you know, in Escambia County seem very obvious to me that it reflects a degree of hostility toward a woman**.

Q: Okay, Now –

A: But there was one other person.

Q: Go ahead, please.

A: **When I interviewed the woman that he said he**

had had the longest relationship with in his life, she described a very abusive relationship. She said he hit me all the time, and then it would be it's never gonna happen again, I'm Sorry, and then it would happen again.

MR. KILLAM: Your Honor, I'm going to object to this testimony. It's not proper.

MR. MURRAY: Judge, it is proper. If we can approach the bench, we can deal with this.

(At the bench:

MR. KILLAM: This is uncharged criminal conduct that he has not been convicted of, it's highly improper, and I move for a mistrial.

THE COURT: This is – this is supposedly some abuse that he performed on his wife?

MR. KILLAM: It' talking about criminal conduct.

MR. MURRAY: It's his girlfriend and it's hearsay. Hearsay is admissible at penalty phase.

MR. KILLAM: Not that kind.

MR. MURRAY: Yes.

THE COURT: I believe it can be. Go ahead.

MR. MURRAY: Thank you.

(Bench conference concluded.)

THE COURT: Let me stop you. We're going to take a short recess for five minutes. Ladies and gentleman of the jury, you may retire.

(Jury out.)

MR. KILLAM: This line of questioning has brought out uncharged criminal conduct on the part of the defendant. I have not placed in issue the defendant's lack of any prior significant criminal

record, any issue as a mitigating factor, nor is there an aggravator here of prior history of violent convictions. But yet the State has been allowed now to back door through this witness and through they say is a live witness activity that is not admissible in these proceedings because it is not an issue in making an alleged medical diagnosis that he has some problem with women. That is not the issue. The issue is what was his mental condition at the time of these offenses, whether or not this doctor can reap what the extreme mental or emotional distress or that the defendant couldn't appreciate the criminality of his conduct to a substantial degree.

To introduce testimony of criminal conduct that he has not been tried for is fundamental error, that for this Court to allow it is a departure from the essential requirements of the law, and I don't see anything but a retrial of this case as a result of this testimony.

MR. MURRAY: Judge, his experts came in and testified and has led this jury to believe that what happened during the course of this murder is that this defendant who has – who has a hot button in regards to the death of his mother, that somehow that button was pushed by the victim and, therefore, he was unable to conform his conduct and he was under extreme emotional distress at the time of the offense.

What this expert is going to say, that is just as likely and perhaps probably is that no, it's not the question with the mother at all, it is this abiding anger toward women that would explain that, and therefore he was not under substantial emotional distress and/or unable to conform his conduct to the requirements of law. It's another theory, and that's the whole purpose of this and it's proper rebuttal.

MR. KILLAM: It's not.

THE COURT: If you have moved for reconsideration of my decision, I overrule the motion for reconsideration. My decision stands. I will permit this testimony.

* * *

> Q: (By Mr. Murray) **Dr. McClaren, based upon the interviews you told us about, were you able to determine whether or not the defendant during the time period of this murder harbored a significant anger directed toward women?**
>
> A: **Yes, I believe by his own words to investigators that he did**.

(T. 2025-31)(emphasis added).

Mr. Zack's alleged hostility and violence toward women constituted bad character evidence and nonstatutory aggravation.

The consideration of improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Zack's constitutional rights. Penry v. Lynaugh, 108 S.Ct. 2934 (1989).

By the State's own admission, the hearsay testimony of Mr. Zack's alleged abuse of his ex-girlfriend was not related to any of the aggravating circumstances and thus, should have

been inadmissible. See Hitchcock v. State, 673 So. 2d 859, 861 (Fla. 1996).

Furthermore, in Perry v. State, this Court vacated a defendant's sentence of death and remanded for a new sentencing proceeding. 801 So. 2d 78 (Fla. 2001). In Perry, this Court found that the introduction of Perry's ex-wife's testimony about Perry's violence toward her constituted impermissible nonstatutory aggravation. Id. at 89. The State maintained that the evidence of Perry's violence was relevant to rebut Perry's testimony during the guilt phase that he was nonviolent. Id. at 90. However, this Court found that the State's assertion was rebutted by the record and the testimony was nothing more than nonstatutory aggravation. Id.

As in Mr. Zack's case, the State's asserted reason for introducing the uncharged criminal acts was to rebut Mr. Zack's defense that he reacted violently when the victim made a comment about his mother's murder. However, the State's argument was a pretense in order to put forth irrelevant and highly prejudicial information of prior uncharged bad acts. See also Hitchcock v. State, 673 So. 2d 859, 861 (Fla. 1996)("[T]he State is not permitted to present evidence of a defendant's criminal history, which constitutes inadmissible nonstatutory aggravation, under the pretense that it is being

admitted for some other purpose.”). The testimony did not support any of the aggravating factors. The court erred in admitting the testimony during the penalty phase.

Appellate counsel was ineffective for failing to raise this issue. Habeas relief is proper.

CLAIM IV

APPELLATE COUNSEL FAILED TO RAISE THE PREJUDICIAL ERROR CAUSED BY THE ADMISSION OF GRUESOME AND UNFAIRLY PREJUDICIAL PHOTOGRAPHS THAT VIOLATED MR. ZACK'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Throughout Mr. Zack's capital trial, the State utilized a strategy of trying to evoke an emotional response to gruesome, cumulative evidence with photographs of the crime scene and autopsy.

Over defense counsel's objection, the jury was shown two photographs of the victim's bloody body and the area surrounding the victim with additional blood (T. 308-9). The photographs were shown to an Escambia County Crime Scene Technician, in order to illustrate the crime scene to the jury. Defense counsel argued that only one photograph was necessary and the State conceded that the photos "depict[ed] the same thing, but from a different view." The court allowed the State to admit both of the photos (T. 309), and the jury was shown both of the photos (T. 330).

Trial counsel objected to both of the photos and argued that the victim's injuries could be described by the pathologist and because both of the photos were depicted the same thing – the victim's bloody face (T. 308, 310).

Photographs should be excluded when the risk of prejudice outweighs relevancy. Alford v. State, 307 So. 2d 433, 441-42 (Fla.

1975), cert. denied, 428 U.S. 912 (1976). Although relevancy is a key to admissibility of such photographs under Adams v. State, 412 So. 2d 850 (Fla. 1982), limits must be placed on "admission of photographs which prove, or show, nothing more, than a gory scene." Thomas v. State, 59 So. 2d 517 (1952).

Furthermore, a photograph's admissibility is based on relevancy, not necessity. Pope v. State, 679 So. 2d 710, 713 (Fla. 1996). And, while relevancy is the key to admissibility of photographs, this Court has indicated that courts must also consider the shocking nature of the photos and whether jurors are thereby distracted from fair factfinding. Czubak v. State 570 So. 2d 925, 928 (1990).

The State elicited testimony from witnesses regarding the crime scene and the injuries to the victim. The medical examiner, Dr. McConnell, testified at great length to the victim's injuries (T. 505-510). The defense did not object to Dr. McConnell's descriptions or to the use of some of the slides displayed to the jury which were taken during the autopsy (T. 500). Thus, there was no need to admit bloody photographs taken from the crime scene in order to depict the victim's injuries.

Likewise, trial counsel objected to photos of the collateral murder victim's autopsy and the crime scene based on the fact that the photos made the collateral crime a feature of the trial and that

the photos were irrelevant and highly prejudicial to Mr. Zack (T. 524-530). Even the court questioned the need to go into such detail with the photos in regard to the collateral murder (T. 525, 527). Although the court did "not believe that [the prosecutor] need[ed] to go into the minute detail involving the death of the Okaloosa woman", the court ultimately admitted two slides depicting the Okalossa victim's injuries (T. 527-30). Additionally, defense counsel objected to the State displaying enlarged photographs during its guilt phase closing argument (T. 1406-7). The photos were displayed on the screen for extended periods of time (T. 1407). Defense counsel argued for a mistrial: "because [the photos] have been overemphasized by the use of this equipment and length of the time that they were left up there and emphasized to the jury." (T. 1407).[7]

Use of the gruesome photographs was no more than part of the State's strategy of evoking disgust towards Mr. Zack. The prejudice substantially outweighed any probative value, particularly as to the photos of the Okaloosa homicide victim. Mr. Zack was denied a fair trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Duest v. State, 462 So. 2d 446 (Fla. 1985).

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[7]Photos of the collateral murder victim were also displayed to the jury on the overhead projector (T. 1407).

The State's use of the photographs and the length of time of the means of display during the State's closing argument distorted the actual evidence against Mr. Zack at the guilt phase and unfairly skewed the weight of aggravating circumstances at the penalty phase. Appellate counsel failed to raise this issue despite objections by trial counsel. Habeas relief is proper.

CLAIM V

THE COURT ERRED IN ADMITTING EVIDENCE OF OTHER CRIMES TO PROVE MR. ZACK'S GUILT AND ARGUE FOR THE DEATH PENALTY. THE INTRODUCTION OF THE EVIDENCE VIOLATED MR. ZACK'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY PRESENT THIS ISSUE.

On direct appeal, appellate counsel raised the issue that the court erred in admitting evidence of other crimes because the crimes had no relevance, or if they did have any relevance it was "outweighed by the prejudicial impact". This Court denied Mr. Zack's claim and found that the evidence of collateral crimes was admissible because the crimes were "relevant as part of a prolonged criminal episode demonstrating Zack's motive, intent, modus operandi and the entire context from which this murder arose." Zack v. State, 753 So. 2d 9, 16 (Fla. 2000).

However, what appellate counsel failed to raise, despite

trial counsel's objections, and what this Court did not address was the manner in which the evidence of collateral crimes was used to prove facts at issue in Mr. Zack's case. And, most importantly, the improper use of the evidence to prove aggravating circumstances at the penalty phase.

Over defense counsel's objection, the State was allowed to introduce photographs, the video and slides from the crime scene in Okaloosa County and the slides of the autopsy of the Okaloosa victim (T. 378-86; 524, 530). The State argued that the photos and slides showed similar traumas that the victims suffered, i.e., that they were both beaten about the head, so the photos and slides were relevant (T. 525). The court pointed out that, in fact, the manner of death was different as to the victims: the Okaloosa victim was strangled while the Escambia victim was stabbed (T. 525). The court even told the State that: "I do not believe that we need to go into the minute detail involving the death of the Okaloosa woman as these slides would purport to do." (T. 527). Even so, the court allowed the photos and slides to be introduced and displayed to the jury.

Additionally, during the guilt phase and again over defense counsel's objection, Dr. McClaren was allowed to discuss the collateral crimes evidence in rebutting the defense's claim that Mr. Zack was not guilty of first degree

murder.

During the defense's case, Dr. Michael Maher testified as a non-examining expert. He explained post traumatic stress syndrome and its symptoms or features as well as fetal alcohol syndrome (T. 1168-1246). Dr. Maher also provided some testimony by way of hypothetical based upon the circumstances surround the Escambia victim (T. 1205-6). Dr. Maher was not asked about the collateral crime evidence. However, in rebuttal, the State argued that is was necessary for Dr. McClaren to discuss the other crimes, including the Okaloosa homicide, in order to explain his opinion, through hypotheticals that the situations illustrated specific intent (T. 1265). The State argued that Dr. McClaren's testimony was necessary to show identity and intent (T. 1266).

Initially, the court ruled: "I'm going to rule that this is improper rebuttal testimony, that the State is going outside the realm of the evidence presented by the Defense through the testimony of Dr. Maher. I will not permit any testimony with
regard to or any basis or hypothetical eluding to any crime committed in Okaloosa County." (T. 1267). The State reargued the point and added that Dr. McClaren's testimony was necessary to rebut all of the defense witnesses, not just Dr. Maher (T. 1267-9). Thus, the court reconsidered and allowed

the testimony (T. 1269).

Despite the State's contention, the rebuttal testimony had nothing to do with the identity of Mr. Zack. Mr. Zack confessed to causing the death of Ms. Smith, the Escambia victim. Likewise, the State's argument that Dr. McClaren needed to discuss the collateral crimes, including the Okaloosa homicide, in order to show Mr. Zack's intent was untrue.

Dr. McClaren's testimony which repeated the minute details of the Okaloosa crime and the photographs and slides were unnecessary to any of the issues.

In Henry v. State, this Court reversed the defendant's conviction for first degree murder and ordered a new trial because of the admission of excessive testimony concerning the defendant's murder of his wife's son. Although the Court found that the evidence was relevant to the case because it was part of the prolonged criminal episode, which was also the basis this Court found in affirming the admission of the evidence in Mr. Zack's case, the Court went on to state:

> Some reference to the boy's killing may have been necessary to place the events in context, to describe adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness. However, it was totally unnecessary to admit the abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical

> examiner's photograph of the body. Even if the State had been able to show some relevance, this evidence should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. § 90.403, Fla. Stat. (1985). Indeed, it is likely that the photograph alone was so inflammatory that it could have unfairly prejudiced the jury against Henry.

574 So. 2d 73, 75 (1991).

As in Henry, the State's use of photographs and Dr. McClaren's testimony were repetitious and prejudicial; they were unnecessary in light of the abundant testimony which adequately served the purpose of similar fact evidence. All total, the State elicited testimony from ten witnesses about the Okaloosa homicide, including Mr. Zack's statement to law enforcement and his taped statement. Much of the evidence was repetitious and unnecessary to show Mr. Zack's identity or motive or to explain the context of the Escambia crimes. Indeed, the State went "too far in introducing evidence of other crimes." Randolph v. State, 463 So. 2d 186, 189 (Fla. 1984).

Defense counsel objected to all of the unnecessary, repetitious and prejudicial evidence. Appellate counsel was ineffective for failing to raise this issue.

Appellate counsel was also ineffective in failing to raise the claim that the State improperly introduced evidence of collateral crimes to support aggravators and argue for the

death penalty.[8]

In its penalty phase arguments, the State repeatedly referred to the fact that Mr. Zack had already committed a murder when he came to Pensacola and met Ms. Smith (T. 1596, 1601). The State told the jury that they could use the prior murder to determine whether or not aggravating factors had been proven (T. 1601). Defense counsel objected to the State's use of the collateral crime evidence to establish aggravating circumstances (T. 1601-2).

This Court has held that: "Even if it were permissible for a judge to rely on the circumstances of previous crimes to support the finding of an aggravating factor, such evidence, standing alone, can never establish, beyond a reasonable doubt, that the murder at issues was so aggravated." Finney v. State, 660 So. 2d 674, 681 (Fla. 1995)(quoting Power v. State, 605 So. 2d 856, 864 (Fla. 1992)).

In Mr. Zack's case, the prosecutor heavily relied upon the evidence of collateral crimes, including the Okaloosa homicide, in order to establish the cold, calculated and premeditated aggravating factor, the avoid arrest aggravating factor; the committed in the course of a sexual battery aggravating factor and the crime was committed for financial

[8]The evidence also constitutes non-statutory aggravation.

gain aggravator.[9] In fact, the trial court specifically referenced the evidence of collateral crimes in finding the cold, calculated and premeditated factor and in finding that the murder was committed to avoid arrest.

Appellate counsel failed to raise this issue despite objections by trial counsel. Habeas relief is proper.

CLAIM VI

MR. ZACK'S RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WAS VIOLATED WHEN THE TRIAL COURT ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO PRESENT THIS CLAIM.

At trial, defense counsel objected to the introduction of a baseball cap that purportedly belonged to Mr. Zack. The baseball cap was recovered from the victim's boyfriend's automobile, which the victim had been using (T. 281). The baseball cap had the saying "Bad to the Bone" written on the front of the cap and also had a "skull on it and Confederate bars and stars around the skull." (T. 281-2). Defense counsel objected to the admission of the cap based on the fact that the prejudicial nature outweighed any probative value (T. 282). In fact the defense argued that "in view of the fact

[9]On direct appeal, this Court struck the avoid arrest aggravator and found that the aggravator that Mr. Zack was on felony probation was inapplicable in Mr. Zack's case. Zack v. State, 753 So. 2d 9, 20 and 25(Fla. 2000).

that we have Afro-American jurors that we have, and I see no evidentiary value in introducing this hat." (T. 282).

The State responded by saying that the baseball cap was useful because a baseball cap was found in the Okaloosa victim's automobile (T. 283). The defense again argued that there were articles of Mr. Zack's clothing as well as the hat that were located in the victim's car and therefore there was no need to introduce the hat to establish that Mr. Zack had been present in the victim's car (T. 283). The court overruled the defense's objection. The State introduced the baseball cap and elicited testimony from the victim's boyfriend that the hat did not belong to him or the victim (T. 290).

Later, during the testimony of a pawn shop owner and over defense counsel's objection, the State emphasized the hat that Mr. Zack was wearing, which was the hat obtained from the victim's car (T. 638-9). Defense counsel argued that the emphasis about the hat was unnecessary, since the State had shown the jury the videotape of Mr. Zack in the pawn shop.

Also, the State told the jury, in closing argument: "And in addition to admitting that he was in the pawn shop, he's got a hat on, and **this is how he considers himself in the day following – the two days following having committed two murders**." (T. 1406)(emphasis added). Defense counsel objected

to the State's argument that the hat was somehow relevant to Mr. Zack's intent and also to the repeated display of the hat and moved for a mistrial (T. 1406). The court denied the motion (T. 1406).

In addition to the baseball hat, the State introduced irrelevant evidence through Mr. Zack's taped statements. The jury heard Mr. Zack's taped statement provided to Okaloosa County law enforcement regarding the Okaloosa victim, Ms. Russillo (T. 832-901). During the statement, while explaining why he pawned the firearms he had taken from Mr. Chandler, Mr. Zack stated: "I never have – never known – I been arrested a million times before and never had no problem like that . . ." (T. 854). Mr. Zack's statement was irrelevant and highly prejudicial. The statement should have been redacted so that the jury would not have heard Mr. Zack's comment.

Likewise, during his taped statement, Mr. Zack told law enforcement:

> I walked to and from the store, from that house to the store, as a matter of fact. There is a black guy in the trailer park right down from where I was staying at. Now I'm sitting here remembering. I know he stays in one of them little trailers, because I was trying to get a ride out of here, and he told me to go to this one guy's that's over there working on his trailer. I turned around. He had a wife. He had kids. I didn't want to get this man involved, just in case something broke out.
>
> I started to tell the man hey because I needed to talk to somebody. I damn sure ain't gonna talk to this black guy, you know. I don't get along with

> black people. That's what stated my whole life off wrong anyway. My sister wanted to get married to one, you know, and she was doing her thing on drugs, too, you know. But I remember the guy.

(T. 887-8).[10] Again, Mr. Zack's comment was irrelevant to the facts of the case and highly prejudicial. The statement should have been redacted.

Only relevant evidence is admissible. § 90.402 Fla. Stat. Relevant evidence is defined as: "evidence tending to prove or disprove a material fact." § 90.401. Further, "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403 Fla. Stat.

The baseball cap with the saying "Bad to the Bone" and depicting a confederate flag along with Mr. Zack's statement that he had been arrested several times and did not get along with black people were inadmissible because they were not relevant to his case, and they were overly prejudicial.

The baseball cap did not prove any material fact at issue. Mr. Zack confessed to being in the victim's car throughout the evening of the crimes and to taking the victim's car after leaving her house. Additionally, the State

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[10]Mr. Zack's statement further exacerbates the prejudice the State's introduction of the baseball cap with the confederate symbol displayed on it.

introduced articles of clothing that belonged to Mr. Zack that were obtained from inside the car. There was no doubt that Mr. Zack had been present in the victim's car – this fact was established by Mr. Zack's confession and by the identification of the other articles of clothing found in the car. Rather, the baseball cap was introduced solely to inflame the jury and to argue that the cap demonstrated Mr. Zack's opinion of himself and racial prejudice, i.e., evidence of his bad character. In closing argument, the State argued that the hat reflected Mr. Zack's state of mind and "how he considered himself" shortly after committing two murders.

Likewise Mr. Zack's statements about being arrested several times and not getting along with black people were not relevant to any material issue about guilt or innocence. Again, his comments were only introduced as bad character evidence. As such, the taped statement should have been redacted so that the jury would not hear the prejudicial comments.

Even if the evidence at issue was somehow relevant, the prejudice of its admission substantially outweighed its probative value. In State v. McClain, this Court held:

> In weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional

> basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction.

525 So. 2d 420, 422 (Fla. 1988).

The baseball cap had little probative value to the crimes with which he was charged. He did not deny being with the victim in her car. Also, there was much evidence presented that linked Mr. Zack to the victim, beyond his own confession. The introduction of the hat was unnecessary and only done to evoke an emotional response and disgust from the jury.

Likewise, the statements about not getting along with black people and having been arrested, had no probative value. The jury did not need the evidence to resolve any of the facts in determining Mr. Zack's guilt. The evidence should have been excluded.

Appellate counsel was ineffective for failing to raise this issue. Habeas relief is proper.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Zack respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida, 32399-1050, on February __, 2004.

CERTIFICATE OF TYPE SIZE AND STYLE

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

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